RECORD AND BRIEFS

No. 09-1158

FEB 7 - 2010

In the
Supreme Court of the United States

DAVID MAXWELL-JOLLY, Director of the Department of Health Care Services, State of California, et al.,

Petitioners,

v.

CALIFORNIA PHARMACISTS ASSOCIATION, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

EDMUND G. BROWN JR.
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
DAVID S. CHANEY
Chief Assistant Attorney General
GORDON BURNS
Deputy Solicitor General
DOUGLAS M. PRESS
Senior Assistant Attorney General
RICHARD T. WALDOW
KARIN S. SCHWARTZ*
SUSAN M. CARSON
JENNIFER KIM
Supervising Deputy Attorneys General
GREGORY BROWN
GREGORY M. CRIBBS
Deputy Attorneys General

455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
Telephone: (415) 703-1382
Fax: (415) 703-5480
Email: Karin.Schwartz@doj.ca.gov

**Counsel of Record*
Counsel for Petitioners

Of counsel:
DAN SCHWEITZER
2030 M Street, NW, 8th Floor
Washington, DC 20036
(202) 326-6010

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REPLY BRIEF FOR PETITIONERS

This petition raises the same questions posed in *Maxwell-Jolly v. Independent Living Center of Southern California*, No. 09-958: whether private parties may invoke the Supremacy Clause to enforce a Medicaid statute, 42 U.S.C. § 1396a(a)(30)(A), that does not meet the requirements for private enforcement identified in *Gonzaga University v. Doe*, 536 U.S. 273 (2002) and other cases; and whether courts may enjoin state Medicaid reforms based on entirely atextual requirements.

On May 24, 2010, the Court invited the Solicitor General to file a brief expressing the views of the United States in *Independent Living*. At minimum, the Court should issue a similar invitation here in order to identify the best vehicle for these issues. If *Independent Living* merits such consideration, then *a fortiorari* so do the more expansive holdings at issue here.

Respondents' oppositions offer little that is new beyond misstatements of what the Ninth Circuit held in the present cases (*Cal. Pharm. II* and *III*, *Indep. Living IV*, *Dominguez*) and unsupported and irrelevant assertions, as addressed below.

I. The Court Should Review the First Question Presented

The Court should review whether a private party may enforce a Spending Clause statute that does not

satisfy the traditional requirements for private enforcement.

1. This Court has long held that Congress must create "private rights of action to enforce federal law." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Without Congressional intent to permit private enforcement, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-87. Because Congress does not always state its intentions, this Court has developed tests for determining when such a cause of action may be implied, *Cort v. Ash*, 422 U.S. 66 (1975), or authorized under § 1983. *Gonzaga*, 536 U.S. at 283-86.[1]

Under the foregoing precedents, the present case is an easy one. Applying *Gonzaga*, the Ninth and several other circuits have held that the text and structure of § 1396a(a)(30)(A) do not evince Congressional intent to create privately enforceable "rights." *See, e.g., Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005); *Long Term Care Pharmacy Alliance v. Ferguson*, 362 F.3d 50, 58 (1st Cir. 2004) (agency review is "central means of enforcement"). To circumvent this law, the present cases are styled as "preemption" claims, but

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[1] Given these precedents, petitioners have never contended that "express statements by Congress [are required] to create an implied private right of action." *See* Independent Living IV Opp. at 21.

preemption *also* turns on Congressional intent. *Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009). Further, in contrast to some other constitutional provisions, the Supremacy Clause does not create a right of action. *Dennis v. Higgins*, 498 U.S. 439, 450 (1991).

2. Respondents dispute, for the first time in this litigation, evidence that Congress intended to preclude private suits when it repealed the Boren Amendment. Cal. Pharm. Opp. at 22. However, the language in the cited committee report is not limited to amended § 1396a(a)(13)(A), but encompasses "any other provision of [§ 1396a]." H.R. Rep. No. 105-149, at 591 (1997). For this reason, numerous courts construing § 1396a(a)(30)(A) have cited this language, along with the text and structure of the statute itself, when denying private efforts to enforce § 1396a(a)(30)(A).[2]

Respondents cite inapposite decisions from this Court in order to cast their Supremacy Clause-based claim as well-established. Petitioner Maxwell-Jolly addressed these and related arguments fully in *Independent Living*, No. 09-958. Respondents cite Justice Kennedy's dissent in *Golden State Transit*

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[2] *Pa. Pharmacists Ass'n v. Houstoun*, 283 F.3d 531, 540 n.15 (3d Cir. 2002); *Evergreen Presbyterian Ministries Inc. v. Hood*, 235 F.3d 908, 929 n.26 (5th Cir. 2000), *overruled in part on different grounds, Equal Access for El Paso, Inc. v. Hawkins*, 509 F.3d 697 (5th Cir. 2007); *Bio-Medical Applications of NC, Inc. v. Elec. Data Sys.*, 412 F. Supp. 2d 549, 554-55 (E.D.N.C. 2006); *Burlington United Methodist Family Servs., Inc. v. Atkins*, 227 F. Supp. 2d 593, 596 n.3 (S.D.W.Va. 2002).

Corp. v. City of Los Angeles, 493 U.S. 103, 113 (1989), which recognized that "a private party can assert an immunity from state or local regulation on the ground that the Constitution or a federal statute, or both, allocate the power to enact the regulation to the National Government, to the exclusion of the States." However, respondents here are not invoking preemption defensively as an immunity from regulation, but offensively to create a stand-alone cause of action.

3. Confusion and conflict among the circuits support review, including several circuits' misapplication of this Court's precedent and their erroneous belief that this Court already has reached the question presented. Pet. at 7. Far from "abandoning" an argument that a split exists with the Eleventh Circuit, petitioner Maxwell-Jolly reiterated it just last month. *Independent Living*, No. 09-958, Reply Brief at 7.

4. Respondents' "vehicle" argument mischaracterizes mandamus law in California and petitioner Maxwell-Jolly's prior briefing. In *Independent Living*, petitioner Maxwell-Jolly accurately cited a leading California treatise and a California Supreme Court decision for two propositions: (1) mandamus requires that petitioner have a "clear, present, and beneficial right . . . to the performance of" a (ministerial) duty; and (2) "mandamus can give no right . . . although it may enforce one." It is true, as respondents note, that some intermediate state appellate decisions have allowed enforcement under the mandamus statute, Cal. Code. Civ. Proc. § 1085, of federal statutes that are not enforceable under § 1983. The California

Supreme Court has not reached this issue, however, and no published California appellate opinion has addressed the enforceability of § 1396a(a)(30)(A), a provision which, properly construed, neither confers "rights" nor imposes "ministerial" duties.[3] Moreover, § 1085 may be preempted if it is construed to permit private enforcement of § 1396a(a)(30)(A) in contravention of Congressional intent.

II. The Court Should Review the Second Question Presented

The Court also should review whether a court may enjoin a state law for failure to comply with purported requirements in a Spending Clause statute that neither Congress nor any federal agency created.

1. The Ninth Circuit has added new requirements to § 1396a(a)(30)(A) in a series of decisions. First, the court created a "study" requirement and mandated that Medicaid payments reflect provider costs. *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491 (9th Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998). Then, in the six opinions at issue here and in *Independent*

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[3] In *CAHF v. DHS*, No. A107551, 2006 WL 3775842 (Cal. Ct. App. Dec. 26, 2006), the court construed an "add-on" provision unique to California's state plan. The court's observations regarding § 1396a(a)(30)(A) are dicta, and *California Pharmacists* respondents' citation to this unpublished decision violates rule 8.1115 of the California Rules of Court (unpublished opinion "must not be cited or relied on"). The Court of Appeal denied CAHF's publication request.

Living, No. 09-958, it added requirements as to *who* must conduct the study; *what* the study must say; on what type of *data* the study must rely; and *when* the study must occur.[4] As these requirements do not appear in § 1396a(a)(30)(A), the Ninth Circuit's approach "more closely resembles 'invent[ing] a statute rather than interpret[ing] one.'" *Hardt v. Reliance Standard Life Ins. Co.*, No. 09-448, ___ U.S. ___, 2010 WL 2025127, at *7 (U.S. May 24, 2010).

The Ninth Circuit's revisions conflict with Congressional intent. Congress *used* to require states to "*find[], and make[] assurances*" that Medicaid payments were "reasonable and adequate to *meet the costs* . . . incurred by efficiently and economically operated" providers. *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 503 (1990) (emphasis added). Congress repealed the Boren Amendment to increase states' flexibility in running their Medicaid programs and because it was concerned about the proliferation of private lawsuits challenging Medicaid rates. *Evergreen*, 235 F.3d at 919 n.12; Brief for the United States as Amicus Curiae, *Belshe v. Orthopaedic Hosp.*, No. 96-1742 (S. Ct. Nov. 26, 1997), 1997 WL 33561790. However, the Ninth Circuit has made it harder for states to improve efficiency and economy in their Medicaid programs, and has invited even more lawsuits. And it has added requirements to

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[4] Respondents contend these requirements are "textually-rooted," Cal. Pharm. Opp. at 26, but never identify the alleged text.

§ 1396a(a)(30)(A) that are very similar to, though more onerous than, those Congress purposefully eliminated from § 1396a(a)(13)(A), including a requirement of cost-based rates that the United States agrees does not exist. Brief of the United States, *supra*.

Respondents say that the atextual "goalposts" are not "moving," but the Ninth Circuit opinions speak for themselves. Moreover, respondents do not dispute that, under *Orthopaedic*, 103 F.3d at 1494, the State was allowed to implement the rates while a study was being conducted – an approach that conflicts irreconcilably with the court's current rejection of several formal, pre-implementation studies prepared by DHCS.

Respondents say that Ninth Circuit is not "overreaching." However, when a court repeatedly takes for itself functions delegated to other branches – here, both Congress (responsibility for drafting statutes and determining who may enforce them) *and* the executive (responsibility for enforcing federal laws) – it has overreached.[5]

2.a. Respondents assert that the Ninth Circuit grounded preemption of the AB1183 reductions (but not SB6) on an alternative finding that the California "legislature . . . was concerned 'solely with budgetary

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[5] *California Pharmacists* respondents' description of interactions between the State and the Ninth Circuit panel is not only irrelevant, but highly selective and misleading.

matters'" when it enacted those reductions. Cal. Pharm. Opp. 10, 24-25; *see also* Independent Living IV Opp. at 7, 26-27; Dominguez Opp. at 13. But the portion of the Ninth Circuit opinion to which respondents selectively quote did not make such a finding of the Legislature's (purportedly) improper intent. It merely described the documentary evidence before the trial court, which the court held inadequate because, *inter alia* it did not expressly mention the §1396a(a)(30)(A) factors. Pet. App. 20 ("The legislative history nowhere mentions any of the §30(A) factors . . . and is concerned solely with budgetary matters.").

That the legislative history did not expressly mention § 1396a(a)(30)(A) is understandable given the law at the time. When the Legislature deliberated, the courts had not yet created (or affirmed) the new atextual requirements. Thus, the Legislature could not know that the courts would construe § 1396a(a)(30)(A) to impose duties directly onto it, complete with specific study and express documentation requirements, and that it could not rely on DHCS (the single state agency designated to implement Medi-Cal, 42 U.S.C. § 1396a(a)(5); Cal. Welf. & Inst. Code § 10740) to discharge them. And that is the problem: a state cannot comply with the terms of its contract with the federal government if it does not know what those terms will be until a court announces them, *see Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17-18 (1981), let alone if a

court can modify or expand those terms with each new decision.

In any event, § 1396a(a)(30)(A) does not prohibit a state from considering "budgetary matters" when adjusting rates. To the contrary, it *requires* such consideration, at least to the extent that it directs states to adopt "methods and procedures" in their state plans to assure, *inter alia*, the "efficiency" and "economy" of their payments.[6] Moreover, it would be irresponsible for California *not* to consider "budgetary matters" when analyzing the billions of dollars in Medicaid payments it makes each year.

Respondents characterize the nuanced (i.e., 1%, 5% and 10%) reductions in AB1183 as "across-the-board," "arbitrary," and wholly budget-driven. This ignores the months of legislative deliberation that preceded their enactment. And it ignores DHCS's findings in its formal reports that, after the reductions, rates would be reasonable relative to providers' costs; many providers would be reimbursed substantially in excess of their costs; and Medi-Cal recipients would continue to have adequate access to covered services. Pet. at 10-16, 20-21.

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[6] Respondents sometimes omit references to the "state plan" when they quote § 1396a(a)(30)(A), as if to imply that the statute imposes requirements directly on the Legislature, *see, e.g.*, Dominguez Opp. at 2, 18, but, by its terms, § 1396a(a)(30)(A) imposes no substantive requirements beyond those relating to the contents of a state plan.

b. Respondents argue that review should be denied because, at least with respect to the ADHC reductions, the Ninth Circuit found a separate "substantive" violation of § 1396a(a)(30)(A) based on DHCS's concession that "at least some ADHC Medi-Cal providers would stop treating beneficiaries due to AB1183." *See* App. at 33; Cal. Pharm. Opp. at 25. But, this is the wrong legal standard; § 1396a(a)(30)(A) is not concerned with whether some providers may leave Medicaid (or suffer financial injury), but rather whether sufficient providers will remain.[7] Contrary to respondents' arguments, the Ninth Circuit did not hold there were "substantive" violations with respect to the other reductions. *See, e.g.*, Pet. App. 76 (plaintiffs not required to show "a substantive violation").

c. Respondents argue that the formal AB1183 studies conducted by DHCS were inadequate because DHCS lacked discretion not to implement the reductions after the Legislature had acted. But, had the studies demonstrated a violation that DHCS could not address itself, it would have asked the Legislature for relief, which would have acted to comply with the law. *Alden v. Maine*, 527 U.S. 706, 755 (1999) ("We are unwilling to assume the States will refuse to honor . . . or obey the binding laws of the United States.").

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[7] DHCS's formal report documented that Medi-Cal recipeents had far greater access to ADHC services than the general population.

d. Respondents argue that petitioners waived arguments in the trial courts that two studies (Myers and Stauffer, DSS) operated to discharge duties on the Legislature to study the enactments challenged in *Dominguez* and *Independent Living IV*.[8] Respondents acknowledge, however, that on appeal petitioners raised and the Ninth Circuit passed on these very arguments. Pet. App. 55-57, 79-80. And respondents do not dispute that petitioners preserved the larger, purely legal issue of whether § 1396a(a)(30)(A) imposes any duties whatsoever on the Legislature. Given the state of law at the time the evidence was introduced, respondents' waiver arguments demonstrate only that a state's attorneys may fare no better than its legislature at anticipating atextual requirements before they are announced.[9]

3. While respondents dispute that a circuit split exists, their main support is the Ninth Circuit's *own* assertion that its decision was "'consistent with that of [other] circuits.'" Cal. Pharm. Opp. at 9-10. The

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[8] *Dominguez* does not even involve state rate-setting. Respondents dispute this based on the fact that, after SB6 was enacted, petitioners directed the counties to submit new rate packages, Dominguez Opp. at 5, but petitioners only took action to ensure that the packages accurately reflected, *inter alia*, any change in the State's contribution to the counties' rates.

[9] While petitioners conceded in oral argument in *Dominguez* that the Legislature did not expressly consider the § 1396a(a)(30)(A) factors, they did not concede that the Legislature's action lacked foundation or failed to meet any standards imposed by § 1396a(a)(30)(A).

Ninth Circuit stands alone in every aspect of its multiple holdings regarding § 1396a(a)(30)(A). *See Long Term Care*, 362 F.3d 50; *Rite Aid of Pa., Inc. v. Houstoun*, 171 F.3d 842 (3d Cir. 1999); *Evergreen*, 235 F.3d 908; *Methodist Hosps., Inc. v. Sullivan*, 91 F.3d 1026 (7th Cir. 1996); *Minn. HomeCare Ass'n v. Gomez*, 108 F.3d 917 (8th Cir. 1997). Even the Eighth Circuit has expressly rejected that a "study" requirement exists when a state legislature enacts a rate reduction, citing the natural give-and-take of the legislative process. *Compare Minn. HomeCare Ass'n*, 108 F.3d at 918 *with Arkansas Med. Soc'y, Inc. v. Reynolds*, 6 F.3d 519 (8th Cir. 1993).

4. Recent events further support review. On May 27, 2010, the Ninth Circuit held that, even where a state statute expressly sets reimbursement rates at a specific percentage of providers' costs, the Legislature *still* must do a "cost study." *Santa Rosa Mem'l Hosp. v. Maxwell-Jolly*, No. 09-17633, 2010 WL 2124276 (9th Cir. May 27, 2010). Since this petition was filed, at least three new § 1396a(a)(30)(A) lawsuits have been filed, raising to over 40 the number of cases filed nationwide as a result of the Ninth Circuit's *Independent Living* decisions. Pet. App. 228; *CAHF v. Maxwell-Jolly*, No. CV10-03259 (C.D. Cal.); *Developmental Servs. Network v. Maxwell-Jolly*, No. CV10-03284 (C.D. Cal.); *Hospital of Barstow, Inc. v. DHCS*, No. 34-2010-80000522 (Cal. Super. Ct. (Sacramento)).

5. The pending administrative proceedings to review California's proposed state plan amendment (SPA) in *California Pharmacists* and *Independent Living IV* further support review. This petition contends,

after all, that private parties should not be able to interject the courts into Medicaid ratemaking before HHS has discharged its duties. The HHS letter to which *California Pharmacists* respondents cite confirms the highly technical and in-depth nature of HHS's review – one that no court has the expertise or resources to replicate. DHCS has not "stalled" the approval process, which is "off the clock" by agreement with the agency, but is actively coordinating its responses with the agency.[10] While respondents have opinions regarding the State's compliance with the Medicaid Act, Congress entrusted oversight of California's $40 billion Medicaid program to HHS, not to respondents.

6. The interlocutory nature of the underlying orders is no impediment given the purely legal nature of the issues and their national importance (as reflected in the 22-state amicus brief filed in *Independent Living*). California and other states should not have to continue to defend against private challenges to their Medicaid programs for another year or longer when the governing legal principles have been announced by the Ninth Circuit. And, Medicaid will incur billions of dollars in unnecessary costs if the Ninth Circuit's wrong precedents remain in effect.

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[10] Although respondents dispute whether a state may implement changes while a SPA is pending, Cal. Pharm. Opp. at 2, the Ninth Circuit did not reach this issue and the authorities respondents cite concern the now-repealed Boren Amendment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
DAVID S. CHANEY
Chief Assistant Attorney General
DOUGLAS M. PRESS
Senior Assistant
Attorney General
RICHARD T. WALDOW
KARIN S. SCHWARTZ*
SUSAN M. CARSON
JENNIFER KIM
Supervising Deputy
Attorneys General
GREGORY BROWN
GREGORY M. CRIBBS
Deputy Attorneys General

**Counsel of Record*
Counsel for Petitioners

Of counsel:
DAN SCHWEITZER
2030 M Street, NW, 8th Floor
Washington, DC 20036
(202) 326-6010

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